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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JIMMY L. JOE et al., Plaintiffs and Respondents, v. GAS AMERICA AUTO SERVICES, INC., Defendant and Appellant.	B217315 (Los Angeles County Super. Ct. No. BC409277)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory Alarcon, Judge. Affirmed.

Law Offices of Edelberg & Espina, Sherwin C. Edelberg, Claire N. Espina for Defendant and Appellant.

Driskell & Gordon, Robert L. Driskell, Jason A. Fetchik for Plaintiffs and Respondents.

The trial court entered judgment in favor of the landlord in this unlawful detainer action. The judgment is supported by the evidence. The master lease prohibits subleases or assignments of the lease made without the prior written consent of the landlord. Defendant, a purported subtenant, failed to obtain the landlord's consent to a sublease or

an assignment. A few years later, the tenant on the lease declared bankruptcy and terminated the lease. As a result, defendant had no written lease, and cannot challenge the landlord's doubling of the rent. We affirm.

FACTS

The Lease

The Chinatown Gas Station (the Property) is owned by Jimmie Joe (Joe), his wife, and his two sons. In 1998, the four members of the Joe family (collectively, the Landlord) signed an agreement to lease the Property to Ahmad Nikakhtar, for a term ending 2018 (the Lease). The rent was $4,450 per month, and rental increases were capped at 5 percent.

The Lease may not be assigned—and the Property may not be sublet—without the prior written consent and approval of the Landlord. An assignment or sublease made without the Landlord's consent is void and gives the Landlord the right to terminate the Lease. Likewise, the bankruptcy of the lessee gives the Landlord the right to terminate the Lease.

The Sublease

In October 2000, tenant Nikakhtar entered a sublease agreement for the Property with David R. Zarrin (the Original Sublease). Zarrin is the president of appellant Gas America Auto Services, Inc., which operates service stations in seven locations. The Original Sublease was drafted by a commercial lender that loaned Zarrin money to purchase several businesses from Nikakhtar, including the one at the Property.

The Original Sublease explicitly requires the Landlord's written consent. Supposedly, the Landlord's written consent is attached to the Original Sublease as "Exhibit C." There is no Exhibit C to the Original Sublease.[1] The Landlord did not consent to the Original Sublease. Zarrin does not claim that the Landlord ever approved the Original Sublease.

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[1] Or at least there is no Exhibit C in the Appellant's Appendix. If Exhibit C exists, it presumably would be in the appellate record because it is crucial to appellant's case.

At some point after Zarrin and Nikakhtar signed the Original Sublease, Zarrin took the document, cut it up, then pasted it back together, creating a second sublease (the Other Sublease) Compared to the Original Sublease, which is nine pages long, the Other Sublease is only four pages in length. The cut-and-paste job is obvious because pages 2 to 3 of the Other Sublease jump from a partial sentence in paragraph 6 directly to paragraph 12, without explanation. On the last page of the Other Sublease, after the signature lines for Zarrin and Nikakhtar, are the handwritten words "Received & Acknowledged" and the purported signature of Jimmie Joe.

Joe testified that he did not know about the Other Sublease, and that his signature on that document is forged. Zarrin admitted that he did not see Joe sign the Other Sublease, nor did he ask for the signatures of all four owners of the Property. Because Joe was not involved in the sublease transaction, he is unaware of when Zarrin took possession of the Property.

In early 2000, after receiving a rental check from Zarrin, Joe met with Zarrin and an associate of Nikakhtar named Eddie, who was running the gas station. According to Zarrin, he told Joe that he was taking over the business on the Property. Joe responded that he did not care who ran the business, as long as he received rent according to the Lease. During that meeting, no sublease was mentioned. The Original Sublease did not exist until eight months later, in October 2000. Zarrin paid Nikakhtar $100,000 to take over the business on the Property. Purportedly, there is a one-page purchase agreement; however, Zarrin was unable to produce that agreement at trial.

Zarrin Takes Over the Business on the Property

After taking possession of the Property, all of Zarrin's dealings were with Joe, not with Nikakhtar. For eight or nine years, the Landlord accepted monthly rental payments from Zarrin. During this time, Zarrin made improvements to the Property. From January to mid-2000, before he signed the Original Sublease with Nikakhtar, Zarrin converted unused automobile repair bays into a food mart. Joe gave permission for the construction, and came to look at it once every two weeks. At trial, Joe conceded his awareness of the construction on the Property; however, he thought that Nikakhtar was

the person doing the construction. Some improvements on the Property, such as upgrading gasoline pumps and tanks, were paid for by Chevron Oil Company.

Nikakhtar Declares Bankruptcy

Joe learned that Nikakhtar had filed for bankruptcy. In April 2005, Nikakhtar executed a Lease Termination Agreement "to give the lease back" to the Landlord. Joe did not write the termination agreement: he received it from Nikakhtar. The Landlord signed the Lease Termination Agreement.

After Nikakhtar's obligations were discharged in bankruptcy, the Landlord took the position that the Lease had terminated. Joe testified that in 2005, "I tried to get [Zarrin] to enter into a new lease. And [Zarrin] said I have a sublease. He don't [*sic*] want a new lease." Joe informed Zarrin that he no longer had a written lease, only a month-to-month tenancy.

The Unlawful Detainer Lawsuit

In July 2008, Joe sent appellant a notice that the rent was being increased to $10,000 per month effective September 1, 2008. Appellant did not pay the increased rent, because it was more than the Lease allowed. Instead, Zarrin continued to pay the rent due under the Lease, which was $5,151. In February 2009, Joe served a three-day notice to quit or pay rent. This lawsuit for unlawful detainer was filed in March 2009. Zarrin answered that he is the assignee of the original tenant under the Lease, and that the Landlord had no right to increase the rental rate in violation of the Lease terms.

Trial was by the court. On June 4, 2009, the court awarded possession of the Property to the Landlord, plus unpaid rent of $29,391 and an additional $28,667 for unlawful detainer based on a reasonable rental value of $10,000 per month. There is no statement of decision. The court later awarded contractual attorney fees to the Landlord of $3,592. The appeal from the judgment is timely.

DISCUSSION

1. Appeal and Review

Appeal is taken from the judgment. (Code Civ. Proc., § 904.1, subd. (a)(1).) On appeal, our task is not to reweigh conflicts and disputes in the evidence: this is the

province of the trial court, in a bench trial. "'Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment.'" (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 369.)

2. The Landlord Did Not Approve a Sublease or an Assignment

Appellant argues that the Original Sublease and Other Sublease are an assignment of the Lease from Ahmad Nikakhtar to Zarrin. Appellant asks us to focus exclusively on the language in the Other Sublease and to interpret that language as a matter of law, as a lease assignment. Appellant's approach misses the mark, because the underlying factual question is: Did the Landlord give its written consent and approval to *any* sublease or *any* assignment of the lease?

Without evidence of Landlord approval, it does not matter whether Nikakhtar gave an assignment or a sublease. As stated in the Lease, an assignment or sublease made without the Landlord's written consent is invalid, ineffective and void. "A restriction on transfer of a tenant's interest in a lease may absolutely prohibit transfer." (Civ. Code, § 1995.230.) It is true that a landlord's consent for transfer of a tenant's interest in a lease may not be unreasonably withheld. (Civ. Code, § 1995.250, subd. (a).) There is substantial evidence that no one ever asked the Landlord in this case for its written consent to a sublease or an assignment, so there is no proof that the Landlord unreasonably withheld its consent. A tenant has the burden of proving that a landlord's consent was unreasonably withheld. (Civ. Code, § 1995.260.)

The evidence at trial shows that the Original Sublease was prepared by Zarrin's lender. The Landlord never consented to the Original Sublease. Later, Zarrin literally cut up the Original Sublease to create the Other Sublease. He admittedly pasted the back page of the Original Sublease—the signature page—onto the Other Sublease. Nikakhtar did not testify at trial, so there is no evidence that he consented to the Other Sublease.

Critically, Joe testified that the signature on the Other Sublease is not his: he never signed his approval of that document. Joe's claim of forgery is unrefuted. Nevertheless, appellant "maintains that the signature on the [Other] Sublease does indeed

belong to Joe . . . ." There is no support for this claim in the record: no handwriting expert was called, and Zarrin admitted that he did not see Joe sign the Other Sublease. Zarrin's testimony that he *believed* it to be Joe's signature does not make it so. Substantial evidence supports a finding that the signature was a forgery.

Apart from the forgery of Joe's signature, the other members of the Joe family—all co-owners of the Property—did not sign their consent to a sublease or an assignment. On this evidence, the trial court could make a factual finding that the Landlord never gave its written consent to any sublease or any assignment of the Lease. Without the Landlord's written consent, the purported Original Sublease and the Other Sublease are void and of no legal effect.

Appellant contends that the Landlord waived the Lease's covenant against sublease or assignment by failing to declare a breach of the Lease when Zarrin started making rental payments on the Lease. The argument cannot succeed for two reasons.

First, there is no showing that a waiver claim was pursued in the trial court. No waiver defense is raised in appellant's answer to the complaint. The reporter's transcript does not contain a waiver argument. Appellant did not provide us with any record showing that the waiver claim was asserted in written briefing: we have no trial briefs to review. Accordingly, we cannot entertain appellant's waiver claim because there is no showing that the issue was preserved for appellate review. It was forfeited by failure to present it below. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.)

Second, the Lease contains a clause stating that the Landlord's "acceptance of rent hereunder shall not be, or be construed to be, a waiver of any term, covenant, or condition of this Lease." The effect of a nonwaiver clause is to protect a landlord's right to enforce the terms of the lease, even when the landlord knows of a breach; the nonwaiver clause is binding upon the tenant's assignees. (*Karbelnig v. Brothwell* (1966) 244 Cal.App.2d 333, 342; *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 530.) The Landlord's acceptance of rent from Zarrin did not waive the Landlord's right to insist on compliance with the terms of the Lease, including the clause requiring the Landlord's written consent to a sublease or assignment of the Lease.

3. The Lease Terminated When Nikakhtar Declared Bankruptcy

The Lease contains a clause providing that if Nikakhtar is "adjudged insolvent or bankrupt, then . . . [any] assignment or sublease shall be void and LESSOR may, at its option, terminate this Lease forthwith by written notice thereof to LESSEE." During the Lease term, Nikakhtar declared bankruptcy. In connection with the bankruptcy, he and the Landlord signed a "Lease Termination Agreement." This ended the Lease, by mutual agreement. Thus, even if Zarrin had obtained the Landlord's prior written consent to the Original Sublease or the Other Sublease, the trial court could find that the sublease terminated when Nikakhtar declared bankruptcy and forfeited his rights under the Lease.

Following Nikakhtar's bankruptcy, the arrangement that appellant had with the Landlord was a month-to-month tenancy, not a written sublease agreement. Joe testified that he tried to get Zarrin to enter a new lease after the bankruptcy, but Zarrin refused to do so. Contrarily, Zarrin claims that the Landlord did not tell him he had a month-to-month tenancy. Given the conflicting witness testimony, the trial court could choose to believe Joe's testimony and find that Nikakhtar's bankruptcy terminated the Lease; that the Landlord invited Zarrin to sign a new lease following the termination of the Lease; and that Zarrin refused to do so. Thus, substantial evidence supports a conclusion that the Lease terminated, and no new written lease was entered into between the Landlord and appellant, resulting in a month-to-month tenancy.

4. Testimony Regarding Improvements to the Property

Appellant complains that the trial court did not allow testimony regarding improvements made to the Property. When defense counsel began to ask questions at trial regarding improvements, the Landlord objected that any testimony regarding improvements was irrelevant. The trial court overruled the objection because the testimony was relevant to impeach Joe's credibility. Zarrin then testified about the improvements he made, specifically the construction of a food mart in early 2000. Zarrin's brother testified that Joe was aware of and pleased with the improvements made in 2000. In rebuttal, Joe testified that he saw the construction, but did not know that Zarrin was responsible for it. He thought that Nikakhtar paid for the construction.

We fail to see how appellant was prejudiced. The trial court allowed the proffered testimony regarding improvements into evidence. The construction of the food mart was done in early 2000, months before either the Original or the Other Sublease was signed. The Landlord may have seen the construction, but could not have known that Zarrin was acting as a subtenant, since no sublease existed in early 2000. Joe testified that Chevron paid for the installation of tanks, and he paid $140,000 toward that same improvement, with the result that "[i]t was paid double." To Joe's knowledge, Zarrin did not pay "any money for upgrading the tanks, and the pumps and other items." Zarrin did not attempt to rebut Joe's testimony by presenting receipts or construction contracts showing that he paid for these improvements. In any event, tenant improvements are fixtures that become the property of the landlord. (Civ. Code, § 1013.)

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.